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9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
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12
13 JUAN CARLOS VILLALOBOS,

14 Petitioner,

15 v.

16 C.E. DUCART, Warden,

17 Respondent.
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Case No. CV 15-3302 VAP (MRW)

**ORDER DISMISSING ACTION
WITHOUT PREJUDICE**

19 The Court grants the Attorney General's unopposed motion to dismiss this
20 state habeas action.

21 * * *

22 Petitioner is a state prisoner. He filed a habeas action in this Court
23 challenging his convictions for attempted murder and other charges. (Docket # 1.)
24 The Attorney General moved to dismiss the petition as "mixed" because several of
25 Petitioner's claims were unexhausted. (Docket # 8.)

26 The Court (Magistrate Judge Wilner) informed Petitioner in July 2015 of his
27 obligation to respond to the Attorney General's dismissal motion. (Docket # 10.)
28 Judge Wilner specifically informed Petitioner that the Court could consider the

1 motion unopposed – and consented to – under the Local Rules unless Petitioner
2 filed a response. The Court also advised Petitioner that the action could be
3 dismissed under Federal Rule of Civil Procedure 41(b) for failure to prosecute the
4 case. (Id.)

5 Petitioner failed to respond to the Attorney General’s motion by the date set
6 forth in the Court’s order. In August 2015, Judge Wilner issued an order for
7 Petitioner to show cause why the motion should not be granted for the grounds
8 argued by the Attorney General, for failure to oppose the motion under Local Rule
9 7-12, and under Rule 41. (Docket # 11.) The order instructed Petitioner to
10 respond to the OSC and file his substantive response to the Attorney General’s
11 dismissal motion by September 8. (Id.) Petitioner did not file any response.

12 * * *

13 Local Rule of Court 7-12 states that, after a party files a motion with the
14 Court, the failure to file a required response “may be deemed consent to the
15 granting [] of the motion.” That rule applies to the present dismissal motion. The
16 Attorney General plausibly established that Petitioner failed to exhaust his state
17 remedies with respect to his evidentiary claims. Rose v. Lundy, 455 U.S. 509, 522
18 (1982) (inclusion of an unexhausted claim in a federal habeas petition renders the
19 petition mixed and subject to dismissal). Petitioner’s failure to respond to the
20 dismissal motion signifies his consent to the dismissal of the action.

21 Dismissal is also proper under Rule 41(b). Rule 41(b) provides that if a
22 plaintiff “fails to prosecute or to comply with these rules or a court order, a
23 defendant may move to dismiss the action or any claim against it.” Dismissal may
24 be ordered by the Court sua sponte. Link v. Wabash R.R., 370 U.S. 626, 629-30
25 (1962). Dismissal of a civil action under Rule 41 may be appropriate to advance
26 the public’s interest in the expeditious resolution of litigation, the court’s need to
27 manage its docket, and to avoid the risk of prejudice to defendants. Omstead v.
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1 Dell, Inc., 594 F.3d 1081, 1084 (9th Cir. 2010); Ferdik v. Bonzelet, 963 F.2d 1258,
2 1263 (9th Cir. 1992) (analyzing factors supporting dismissal of Section 1983
3 actions).

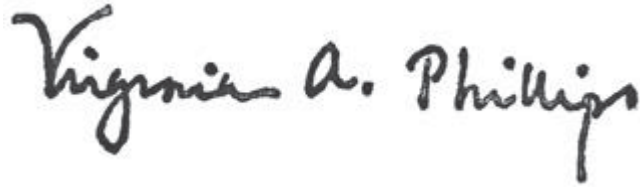
4 Petitioner's failure to prosecute this action – or to respond to the Court's
5 orders requiring him to do so – warrants dismissal under Rule 41(b). Petitioner
6 failed to respond to the Court's orders requiring him to: (a) respond to the Attorney
7 General's dismissal motion; and (b) show cause regarding the status of the action.
8 (Docket # 5, 6, 7.) The public, the Court, and the state have a significant interest in
9 the resolution of this case. Petitioner, by contrast, has demonstrated a lack of
10 interest in pursuing the action to a decision on the merits. Moreover, given
11 Petitioner's failure to respond to the Court's orders, there are no "less drastic
12 sanctions" available to the Court other than a dismissal of the action. Omstead,
13 594 F.3d at 1084. Rule 41 therefore provides an additional basis for dismissing the
14 action.

15 A dismissal under Rule 41(b) ordinarily "operates as an adjudication on the
16 merits" of a claim that leads to a dismissal of the action with prejudice. However,
17 when the dismissal is "for lack of jurisdiction" (such as when a habeas claim is
18 unexhausted), the dismissal should be without prejudice. See, e.g., Fisher v. Clark,
19 No. CV 13-8600 VBF (MAN), 2014 WL 1457816 (C.D. Cal. 2014) (dismissal of
20 habeas petition without prejudice for lack of subject-matter jurisdiction where
21 petition was fully unexhausted).

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1 Therefore, for the reasons set forth above, this action is hereby DISMISSED
2 without prejudice.

3 IT IS SO ORDERED.



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5 Dated: October 13, 2015 _____

6 HON. VIRGINIA A. PHILLIPS
7 UNITED STATES DISTRICT JUDGE
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9 Presented by:



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13 HON. MICHAEL R. WILNER
14 UNITED STATES MAGISTRATE JUDGE
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